The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff v. SCHUYLER PYATTE BARBEAU, Defendant.	NO. CR15-391RAJ GOVERNMENT'S RESPONSE TO MOTION TO CONTINUE

The United States of America, by and through Annette L. Hayes, United States Attorney for the Western District of Washington, Todd Greenberg, Assistant United States Attorney for said District, and Jessica Manca, Special Assistant United States Attorney for said District, respectfully submits this response to the defendant's Motion to Continue (Dkt. 109).

On June 2, 2017, Defendant Barbeau filed a motion to continue the trial in this matter, which is scheduled to begin on June 5, 2017. The motion seeks a continuance for two reasons, both of which are meritless. The Court should deny the motion in all respects.

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A. The Grand Jury Testimony of Special Agent Bennett.

On March 30, 2016, the government produced in discovery two transcripts of grand jury testimony given by FBI Special Agent Daniel Bennett, the case agent assigned to this matter. At the pretrial conference on May 24, 2017, Barbeau informed the government that he could not locate the grand jury transcripts and believed that his prior counsel did not provide the transcripts to him. The government provided Mr. Barbeau with a second copy of the transcripts during the hearing.

Barbeau now claims that he can "prove" the agent "perjured himself" in the transcripts, but that he needs additional time to do so. Barbeau does not further explain the purported perjury or why he needs additional time.

The Court should deny the motion for continuance on this basis. The grand jury transcripts are Jencks Act materials that were timely produced well in advance of trial (even the production on May 24th was far earlier than the Jencks Act requires). Moreover, the transcripts are available to Barbeau to use during the cross-examination of Special Agent Bennett, so he will suffer no prejudice if the trial begins as scheduled.

B. The Undercover Recording.

At the pretrial hearing, Barbeau filed a motion to compel discovery related to a conversation he recalled having in 2015 with an undercover FBI agent in another investigation. The government explained to the Court that the FBI was attempting to verify whether that conversation took place and, if so, whether it was recorded. At the time of the pretrial hearing, the FBI had not been able to identify or confirm any such conversation.

After the pretrial hearing, the FBI continued to investigate this matter, including listening to hours of recordings made during the other investigation. This diligence by the FBI agents resulted in them finding a conversation between Barbeau and undercover agents which took place on February 10, 2015, in Phoenix, Arizona. On June 1, 2017, the FBI provided the undersigned AUSAs with a copy of this recording, and we produced

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it to stand-by counsel that same day. The recording lasts approximately three hours and ten minutes.

The production of this recording on June 1, 2017, does not establish any basis to grant a trial continuance in this case. First, Barbeau is not entitled to introduce any of his statements made on the recording, because those out-of-court statements are inadmissible hearsay. Although the government is entitled to introduce the out-of-court statements of a defendant as a statement of a party-opponent, the defendant may not do the same. An out-of-court statement of a declarant offered by the declarant on his own behalf is inadmissible hearsay because, among other things, it is not a statement by a party-opponent. *See United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000); *see also Williamson v. United States*, 512 U.S. 594, 600 (1994) (the hearsay rule excludes self-serving statements because such statements "are exactly the ones which people are most likely to make even when they are false").

Second, the contents of the recording are extremely incriminating for Barbeau, and very different from the way Barbeau described the conversation to the Court at the pretrial conference. For example, during the recording, Barbeau makes the following statements about the short-barreled rifle at issue in the instant case:

- "My gun violates a lot of NFA and state laws."
- "It's not legal in any way, shape or form."
- When asked if the rifle is illegal because it is automatic, Barbeau responds, "Yeah."
- "I built it so that it can be automatic, and it's a short barrel."
- "You can buy a short barrel, you can buy it. But once it's in your possession…if you want to attach it to a lower receiver, the whole weapon is now a short barrel rifle. And to have it like that is illegal unless you go and you get your SBR tax stamp and get the paperwork for it."

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- “As soon as you attach it to the gun, it’s now illegal until you get the ATF form and do your paperwork and get your tax stamp. But like, I don’t care about that stuff.”

Barbeau makes no showing as to how this recording would be admissible (if offered by him) or how it is relevant or helpful to his defense. Therefore, the motion to continue should be denied.

DATED: June 2, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered parties. I hereby certify that I have served the defendant who is non CM/ECF participant via certified mail.

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